RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GOVERNMENT OF NATIONAL ACCORD, STATE OF LIBYA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is the newly-established government of Libya, which joins in support of the petitioner to present the perspective of, and unique challenges faced by, fledgling and transitional nations with respect to international service of process.[1] Libya has a substantial interest in ensuring that it is served properly before it is required to appear in a foreign court, as well as in defending the inviolability of its diplomatic mission under the Vienna Convention on Diplomatic Relations ("VCDR").

SUMMARY OF ARGUMENT

Diplomatic inviolability guaranteed by treaty under the VCDR prohibits intrusion onto diplomatic premises—even by mailings—for the purpose of serving process. The Foreign Sovereign Immunities Act ("FSIA") provides the sole and exclusive means of obtaining personal jurisdiction over a foreign sovereign and must be read in harmony with the United States' existing treaty obligations. Accordingly, FSIA Section 1608(a)(3) should be interpreted as barring service by mail on a sovereign government via or "in care of" its foreign embassy.

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[1] Counsel for all parties have consented to the filing of this brief and their notices of consent have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than the *amicus*, its members, or its counsel—made a monetary contribution to fund the preparation or submission of this brief.

ARGUMENT

Libya takes no position with respect to the underlying facts in the matter before the Court. Libya strongly condemns all forms, and acts, of terrorism. Although Libya's former pre-revolution regime was the subject of terror-related litigation in the United States, Libya resolved these claims fully in 2008 pursuant to a bilateral settlement agreement with the United States. Libya is now governed by a democratically elected government that works cooperatively with the United States and other nations to combat terrorism. Indeed, Libyan forces have recently worked closely with the United States military to combat ISIL and other violent extremist organizations.

Since the revolution in 2011, Libya has undergone a difficult and challenging transition to democracy. Throughout this tumultuous period, Libya has maintained a diplomatic presence in the United States via its embassy in Washington, D.C. During this period, Libya has been subject to a handful of commercial legal disputes in the United States. As a result, Libya has experienced first-hand the difficulties that can arise from attempts to serve process on a nation that is experiencing political strife. In a striking parallel to the issues presented by this case, in 2015, a litigant in a commercial dispute attempted to serve the Libyan government with a complaint via the Libyan embassy in Washington, D.C. *See United Healthcare Ins. Co. v. Libyan Student Plan, et al.*, Case No. 1:15-cv-00760 (D.D.C. dismissed May 26, 2016). The circumstances

involved in that dispute—in which, for a time, two competing factions both claimed to be the legitimate government of Libya—are illustrative of the potential service of process difficulties that can arise in developing or revolutionary states.

In the midst of ongoing civil strife and threats to the new Libyan government, the plaintiff attempted to effect service on Libya by mailing the service documents to the Libyan embassy in the Watergate building in Washington, D.C., rather than addressing them directly to the head of Libya's foreign ministry in Tripoli, as required by under the FSIA. 28 U.S.C. § 1608(a)(3). Ultimately, Libya was served with the complaint via diplomatic channels pursuant to FSIA Section 1608(a)(4) after service under the preceding section failed. However, the improper attempt to serve Libya via its embassy under Section 1608(a)(3) distracted diplomatic personnel from their official duties and also caused uncertainty about the date on which Libya had been effectively served.

That is exactly the kind of uncertainty that the direct service requirements of FSIA Section 1608(a)(3) were designed to prevent and which transitional states like Libya can least afford. Not all states enjoy the level of political stability and continuity of nations like the United States or the E.U. member nations, in which litigants reasonably can expect normal diplomatic and political functions to continue regardless of world events. Yet, it is these transitional states that have the most at stake in terms of international service of process. For such nations, the connection between their embassies and

their home government can be, at times, uncertain. Moreover, transitional states—often laboring under severe financial constraints—have the most to lose from the entry of a default judgment brought about by improper "forwarding" of service materials directed to one of their foreign embassies. Simply put, developing and transitional nations cannot afford the substantial risks of leaving service of process—and, by extension, the specter of default judgment—in the hands of often-transitory embassy staff who lack any delegated authority over legal matters from their home government. And, pursuant to the diplomatic inviolability guaranteed by treaty under Article 22 of the VCDR, they should not have to.

Finally, the Second Circuit's apparent assumption that embassy personnel may be relied on to transmit service materials to the appropriate authority in their home state is flawed. In states affected by unrest, it is all too common for normal channels of communication and routine government functioning to break down. In such circumstances, it is unrealistic to expect embassy or consulate personnel—who themselves may be involved in or preoccupied with disruptions in their home state or in fact are third-country nationals—to always be able to transmit service materials to authorities in the home state in a timely fashion.

Indeed, such transmission may be impossible or impractical where, for example, diplomatic pouch service between the foreign embassy and home nation are disrupted or where embassy personnel are uncertain as to whom the current government

recognizes as the acting foreign minister. For such nations in flux, the best guaranty that service of process will be made to the current and actual representative of the recognized government is strict compliance with the protections embodied in Section 1608(a)(3). While no process is ever perfect or can ensure that service reaches the appropriate recipient, direct service to the ministry of foreign affairs *in the foreign state* provides the best chance that service will reach the recognized authority of the recipient nation. And failing that, the appropriate next course is service under Section 1608(a)(4) via State Department channels.

Accordingly, Libya joins with the petitioner in urging this Court to adopt the view that (1) FSIA Section 1608(a)(3) does not permit service on a sovereign government via or "in care of" its foreign embassy; and (2) in any event, service upon a foreign embassy with the presumption that service documents will be "forwarded" to the home government constitutes an impermissible intrusion onto diplomatic premises in violation of the VCDR.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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